

REMARKS

Claim 1, as well as claims 2 – 7, and 10 dependent thereon, and claim 11, as well as claims 12 – 15, and 18 dependent thereon, have been amended to require an all natural, nutritionally fortified ready to eat vegetable yogurt and method of manufacturing same by requiring that no artificial additives or preservatives be added to the ready to eat vegetable yogurt and the vegetables remain unfermented. Claims 1 and 11, as well as claims 2 – 7, 10 and claims 12 – 15, and 18 dependent thereon, respectively, have been amended to emphasize that no preservatives or artificial additives need be added to the ready to eat vegetable yogurt and to further recite an all natural vegetable yogurt product fortified with 40 – 60 percent by weight of vegetables. In addition, claims 1 and 11, as well as claims 2 – 7, 10 and claims 12 – 15, and 18 dependent thereon, respectively, have been amended to require that the ready to eat vegetable yogurt be stored at refrigeration temperatures until consumed to prevent the active cultures of the yogurt from fermenting the cold cooked pureed vegetables so that the cold cooked pureed vegetables retain their natural, unfermented, chemical make up.

The amendments to claims 1 and 11, as well as claims 2 – 7, and 10 and 12 – 15, and 18 dependent thereon, respectively, are clearly supported by the original specification, particularly at: page 12, lines 19 – 23; page 13, lines 6 – 10; page 13, line 21 onto page 14, lines 1 – 3; page 15, lines 11 – 13; and page 17, lines 9 – 14.

The ready to eat vegetable yogurt required by applicant's current claims comprises cooked pureed vegetables that are rapidly cooled and pureed to from a cold smooth vegetable puree. The applicant has found that instead of adding preservatives and the like, which is taught by the prior art, the natural taste and chemical make-up of the vegetables is retained by

processing the vegetable yogurt at cold temperatures and maintaining the cold temperatures through refrigeration. Thus, applicant's current claims yield a uniquely produced vegetable yogurt food product that is enables the vegetable to remain unfermented and retain their nutritional values without addition of artificial additives.

Claims 1 – 7, 10, 11 – 15 and 18 require that this cold smooth vegetable puree be blended with cold plain yogurt and natural additives. Applicant's current claims require that no artificial additives and no preservatives be added to the ready to eat vegetable yogurt. Applicant has found that adding cold pureed vegetables to cold plain yogurt, and maintaining cold temperatures, prevents the yogurt from fermenting the vegetable and thereby preserves taste and nutritional properties of the vegetables. Applicant's current claims require that the cooked pureed vegetables range from 40 to 60 percent by weight. The weight percent required by applicant's present claims provides a vegetable yogurt having a significant weight percentage of vegetables without the presentation of preservatives or other non-natural additives, thereby yielding a highly nutritional food packed with essential vitamins, minerals, and fibers inherent in the vegetable utilized.

I. Rejection under 35 U.S.C. §112, first paragraph:

The Examiner has rejected claims 1 – 7, 10 – 15 and 18 in applicant's response dated June 21, 2007 under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement.

The Examiner has stated that the claims 1 – 7, 10 – 15 and 18 fail to comply with the written description requirement because the Examiner contends that the claims, as amended in

the previous response, contain subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor, at the time the application was filed, had possession of the claimed invention. Specifically, the Examiner has stated that the specification does not teach "*wherein said cold cooked pureed vegetables do not undergo fermentation when combined with said cold plain yogurt and no artificial additives or preservatives are added to said ready to eat vegetable yogurt*" as had been required by applicant's previously submitted amended claim 1.

Applicant respectfully disagrees.

The 'written description' requirement implements the principle that a patent must describe the technology that is sought to be patented, serving both to satisfy the inventor's obligation to disclose the technologic knowledge upon which the patent is based, and to demonstrate that the patentee was in possession of the invention that is claimed. *Capon v. Eshhar*, 418 F.3d 1349, 1357, 76 USPQ2d 1078, 1084 (Fed. Cir. 2005). To satisfy the written description requirement, a patent specification must describe the claimed invention in sufficient detail that one skilled in the art can reasonably conclude that the inventor had possession of the claimed invention. *Moba, B.V. v. Diamond Automation, Inc.*, 325 F.3d 1306, 1319, 66 USPQ2d 1429, 1438 (Fed. Cir. 2003). An applicant shows possession of the claimed invention by describing the claimed invention with all of its limitations using such descriptive means as words, structures, figures, diagrams, and formulas that fully set forth the claimed invention. *Lockwood v. American Airlines, Inc.*, 107 F.3d 1565, 1572, 41 USPQ2d 1961, 1966 (Fed. Cir. 1997).

While there is no *in haec verba* requirement, newly added claim limitations must be supported in the specification through express, implicit, or inherent disclosure. MPEP 2163IB.

Applicant's original specification, as filed, conveys with reasonable clarity to those skilled in the art that, as of the filing date sought, that Applicant was in possession of the invention as now claimed. *Vas-Cath, Inc.*, 935 F.2d at 1563-64, 19 USPQ2d at 1117.

Specifically, as per applicant's language “*... and no artificial additives or preservatives are added to said ready to eat vegetable yogurt*” of previously presented amended claim 1, Applicant's original specification clearly and concisely states that “[*T*]there are no artificial additives or preservatives in the ready to eat vegetable yogurt, both of which affect the taste and nutritional properties of food products” in the “Summary of the Invention” section on page 12, lines 19 – 20. And, again in the “Description of the Preferred Embodiments” section on page 15, lines 11 – 13 the specification clearly and concisely states that “*...the ready to eat vegetable yogurt does not call for the addition of any artificial additives or preservatives, both of which affect the taste and the nutritional properties of food products.*” Therefore, applicant respectfully submits that the language pertaining to the express omission of artificial additives and preservatives in previously amended claim 1 was conveyed in the specification at filed with reasonable clarity to those skilled in the art that, as of the filing date sought, Applicant was in possession of the invention with the feature that no artificial additive or preservatives are added to the applicant's vegetable yogurt food product. As such, applicant has retained the previously presented language pertaining to the express omission of artificial additives or preservatives in producing the applicant's vegetable yogurt food product.

Accordingly, reconsideration of the rejection of claims 1 – 7, 10 – 15 and 18 concerning the language “*...no artificial additives or preservatives are added to said ready to eat vegetable*

yogurt" under 35 U.S.C. 112, first paragraph, is respectfully requested.

As per applicant's language "*wherein said cold cooked pureed vegetables do not undergo fermentation when combined with said cold plain yogurt...*" of previously presented amended claim 1. In order to expedite prosecution of the application, applicant has amended previously presented claim 1 to remove the express requirement that "*wherein said cold cooked pureed vegetables do not undergo fermentation when combined with said cold plain yogurt...*"; and has amended claim 1 to more clearly require that the ready to eat vegetable yogurt be stored at refrigeration temperatures until consumed "*to prevent said active cultures of said yogurt from fermenting said cold cooked pureed vegetables so that said cold cooked pureed vegetables retain their natural, unfermented, chemical make up.*" Applicant submits that the original application, as filed, provides support for the currently amended claims at issue.

Applicant's original specification clearly and concisely states the following in the "Description of Preferred Embodiments" section on page 17, lines 9 – 14:

"Keeping the ready to eat vegetable yogurt at the refrigeration temperature prevents the active yogurt culture from fermenting the vegetable products, added sugar and added flavor enhancers. Advantageously, with ready to eat vegetable yogurt, there is retained a natural, unfermented, chemical make up of the vegetables, which are combined with the yogurt in a pureed condition to produce a highly nutritious, delicious, and readily made food product."

This language clearly supports the previously presented limitation concerning the unfermented chemical make-up of the vegetables in the applicant's vegetable yogurt food product. That is to say, the language concisely states that keeping the vegetable yogurt at the

refrigeration temperature prevents the active yogurt culture from fermenting the vegetables and sets forth that the natural, unfermented, chemical make up of the vegetables is retained. What is more, applicant's claim 1, as originally filed, includes a whereby clause requiring that the "*cooked pureed vegetables remain unfermented when the vegetable yogurt is stored at refrigeration temperature.*" The words "remain unfermented" would cause one skilled in the art to infer that the cold vegetables do not undergo fermentation when combined with the cold yogurt. Moreover, key features set forth by the original specification of the process for applicant's ready to eat cooked and pureed vegetable yogurt include, in combination, the adding the cold vegetable mix to cold plain yogurt, adding natural additives, blending the [cold] yogurt with the [cold] vegetables to form a homogeneous, uniform mixture of ready to eat vegetable yogurt, and storing ready to eat vegetable yogurt at refrigeration temperatures until consumed. (See "Description of Preferred Embodiments" section, starting on page 18, lines 20 – 23, and extending onto page 19, lines 1 – 2). Thus, the claim limitation concerning the unfermented character of the vegetables is supported throughout the specification so that Applicant's original specification, as filed, conveyed with reasonable clarity to those skilled in the art that, as of the filing date, Applicant was in possession of the invention as presented.

Accordingly, reconsideration of the rejection of claims 1 – 7, 10 – 15 and 18 under 35 U.S.C. 112, first paragraph, is respectfully requested.

II. Rejection under 35 U.S.C. §103(a):

The Examiner has stated that Applicant's arguments contained in the Response filed June 21, 2007 have been fully considered but not found persuasive. Because the Examiner concluded

that the previous amendments to the claims (including requiring that the cold cooked pureed vegetables do not undergo fermentation when combined with the cold plain yogurt and no artificial additives or preservatives be added to the ready to eat vegetable yogurt) do not influence the conclusion of unpatentability previously set forth, the Examiner maintained the rejection of previously presented claims 1 – 7, 10 – 15 and 18 under 35 U.S.C. §103(a) as being unpatentable over the references cited. These references include in combination: Japanese Patent No. 61231958 to Hara, Japanese Patent No. 55007013 to Kazutada et al., Japanese Patent No. 3112454 to Masahiro et al., and Great Britain Patent No. 2294625 to Oliver.

In summary, the Examiner states that Hara, Kazutada et al., Masahiro et al., and Oliver disclose a yogurt comprising vegetables. (Hara, abstract; Kazutada et al., abstract; Masahiro et al., abstract; and Oliver, entire document, especially pages 1 and 3). The Examiner has stated that the Applicant's claims differ as to the recitation of specific cultures, percents and a cooling step. As to specific yogurt cultures, the Examiner has stated that it is notoriously well-known in the art and used for their art-recognized purpose. As to the percents of vegetable to yogurt claimed by Applicant, the Examiner has stated that, in the absence of showing to the contrary, the amounts claimed are seen to be no more than a matter of choice, dictated by preference, well-within the skill of the art.

The Examiner has stated that Applicant's previously presented arguments that the prior art does not teach rapid cooling, a cold smoother vegetable puree, cold plain yogurt, and the absence of preservatives and additives are not persuasive because in the absence of unexpected results, the use and manipulation of vegetables and percents is well-within the skill of the art and merely a matter of choice. Specifically, the Examiner holds that the prior art clearly teaches the

addition of vegetables to yogurt as is claimed, and that in the absence of a showing to the contrary, applicant is using known components to obtain no more than expected results. The Examiner further notes that once the vegetable is removed from heat, the cooling process is inherent; and the immediate cooling of products to prevent overcooking is conventional. Additionally, the Examiner further notes that the applicant does not specifically teach the absence of preservatives and additives, and that both are optional ingredients.

Any combination of the references Hara, Kazutada et al., Masahiro et al. would not teach, suggest or otherwise achieve applicant's claimed invention. Moreover, a person of ordinary skill in the art would not have been motivated to combine the prior art references to achieve the claimed invention because, based on the teachings in the art, there would **not** have been a reasonable expectation of success in that the references teach that large weight percents of vegetable products mixed with yogurt yield an unstable food product. Therefore, applicant's current claims are patentable over the prior art applied.

In determining obviousness, neither the particular motivation to make the claimed invention nor the problem the inventor is solving controls. The proper analysis is whether the claimed invention would have been obvious to one of ordinary skill in the art after consideration of all the facts. *Federal Register / Vol. 72, No. 195/Wednesday, October 10, 2007/Notices*, pg. 57528 in light of *KSR Int'l Co. v. Teleflex Inc., et al.*, 127 S. Ct. 1727 (2006). The rationale to support a conclusion that a claim would have been obvious is that a "person of ordinary skill in the art would have been motivated to combine the prior art to achieve the claimed invention and that there would have been a reasonable expectation of success." *Id.* at 57534. If any of these findings cannot be made, then this rational cannot be used to support a conclusion that the claim would have been obvious to one of ordinary skill in the art. *Id.* at 57534.

The ready to eat vegetable yogurt required by applicant's current claims comprises cooked pureed vegetables that are rapidly cooled and pureed to from a cold smooth vegetable puree. The claims require that this cold smooth vegetable puree is blended with cold plain yogurt and natural additives and further require that no artificial additives and no preservatives be added to the ready to eat vegetable yogurt. Applicant has found that adding cold pureed vegetables to cold plain yogurt, and maintaining cold temperatures, prevents the yogurt from fermenting the vegetable and thereby preserves taste and nutritional properties of the vegetables. Applicant's current claims require that the cooked pureed vegetables range from 40 to 60 percent by weight. The weight percent required by applicant's present claims provides a vegetable yogurt having a significant weight percentage of vegetables without the presentation of preservatives or other non-natural additives, thereby yielding a highly nutritional food packed with essential vitamins, minerals, and fibers inherent in the vegetable utilized.

The Examiner has stated that applicant's claim differ as to the recitation of specific cultures, percents and a cooling step. As to the percents of vegetable to yogurt claimed by Applicant, the Examiner has stated that, in the absence of showing to the contrary, the amounts claimed are seen to be no more than a matter of choice, dictated by preference, and well-within the skill of the art. However, Applicant respectfully submits that the amounts are not merely a matter of choice, but have been found to provide a product where the vegetables remain stable and unfermented when blended in cold conditions with cold yogurt, while the art teaches to the contrary. Namely, the art applied teaches that the addition of vegetables to yogurt requires preservatives and additives in order to stabilize the vegetables and prevent fermentation and degradation.

Each reference applied by the Examiner teaches the addition of an agent to a food product having vegetables and yogurt in order to provide the function of stability to the food product. The art as a whole, like these references, teaches that vegetables are unstable in yogurt, and as such, small weight percents of vegetables are taught to be used and stabilization means are taught to be needed – otherwise the vegetables will become rancid in taste and lose nutritional value. Therefore, any combination of the references applied and the art as a whole would render producing a food product having a lesser weight percent of vegetable and stabilization additives. Applicant has found that where the vegetables are pureed to form a cold puree that is added to cold yogurt, a large weight percent of vegetables to yogurt can be utilized without fermentation or breakdown of the vegetable. Applicant's claims omit the use of a stabilizing agent while at the same time retaining the omitted element's (stabilizing agent's) function. (MPEP 2144.04 II B, “*Omission of an Element with Retention of the Element's Function Is an Indicia of Unobviousness*”). As such, indicia of unobviousness have been shown by the applicant.

Hara discloses the addition of fermented bean past (MISO) and / or fermented milk product, such as yogurt (NYUFU), to a food product (such as vegetable), in a ratio of ~3pts. MISO / NYUFU to 100pts. food product so that the MISO/NYUFU acts as an agent to retard the freeze-denaturation of the food product. Kazutada et al. discloses a process wherein finely cut or ground vegetables, extracts, juices, *heated or cooked vegetables* are added to yogurt *before* fermentation and a gelatinizing agent is added, wherein the addition before fermentation and the gelatinizing agent are added in order to provide stabilization to the vegetables via soften fermentation odor and improved flavor. Masahiro et al. discloses a process for formulating a

vegetable food product comprising the mixing of vegetables, yogurt and a gelling agent appointed to suppress the grassy smell of vegetables and improve the taste and flavor. Lastly, Oliver discloses a vegetable type yogurt wherein rosaceous fruit, 9 to 31 weight percent, is added as a stabilizing agent acting as a preservative for the yogurt food product.

Under MPEP 2144.04 II B, the omission of an element and retention of its function is indicia of unobviousness. In re Edge, 359 F.2d 896, 149 USPQ 556 (CCPA 1966). In Edge an applicant's claims were directed to a printed sheet having a thin layer of erasable metal bonded directly to a sheet wherein the thin layer obscured the original print until removal by erasing. The prior art in Edge disclosed a similar printed sheet further comprising an intermediate transparent and erasure-proof protecting layer which prevented erasure of the printing when the top layer was erased. The Court in Edge held that although the transparent layer taught by the prior art was eliminated, the function of the transparent layer was retained by the applicant, and therefore the applicant's claims were found unobvious. As in Edge, Applicant's claims 1 – 18 provide a vegetable yogurt that omits an element of the prior art references, while at the same time retaining the element's function.

Applicant's claims 1 – 18 require that cold vegetable puree and cold yogurt be utilized and that no preservatives or artificial additives be added. Unlike the art applied, applicant's food product is stable in the yogurt so that no preservatives are needed. Thus Applicant's claimed invention provides for the omission of the stabilizing agent, while at the same time provides for the retention of the stabilizing agent's function which is achieved by adding the vegetables in a cold pureed state.

Applicant has carried out a consumer survey demonstrating impending commercial

success of applicant's food product. The survey questioned consumers as to the taste, texture, overall appeal, and likelihood of purchasing the product. A scale of 1 – 5 was utilized, with 5 being the highest score indicating a positive score. Four flavors were available for testing: carrot, broccoli, butternut squash and sweet potato. Sixty-two recorded samples of the vegetable yogurt of applicant's present claims were given out, with about forty non-recorded samples. Taste, texture, overall appeal and likelihood to purchase all scored high, averaging approximately 4+ on the scale from 0 to 5. Average score for likelihood to purchase the food product was 4.09 out of 5. It is respectfully submitted that applicant's survey, which demonstrates the strong prospect that applicant's food product will be commercially successful, provides further evidence supporting patentability of the invention called for by applicant's claims.

The addition of a sizeable weight percentage of pureed vegetables, as called for by applicant's present claims 1 – 18, is carried out under cold conditions as the cooked vegetable are rapidly cooled when at least one frozen vegetable is added thereto and mixed to form a cold pureed vegetable that is blended with yogurt so that degradation of the vegetable's nutrients is minimized. The addition of cold pureed vegetables to a yogurt is not taught or suggested by the prior art workers, including Hara, Kazutada et al., Masahiro et al., or Oliver. Nor is the combination of combining cooked vegetables and at least one frozen vegetable taught or suggested by the prior art workers, including Hara, Kazutada et al., Masahiro et al., or Oliver. Moreover, the addition of cold pureed vegetables in amounts ranging between 40 to 60 weight percent is not disclosed or suggested by any prior art worker, including Hara, Kazutada et al., Masahiro et al., or Oliver.

Rather, the prior art teachings, including Hara, Kazutada et al., Masahiro et al., or Oliver suggest that preservatives and the like (rosaceous fruit; jellies; etc.) must be added to vegetable yogurt preparations in order to stabilize the flavoring. None of the prior art references, including Hara, Kazutada et al., Masahiro et al., or Oliver teach a ready to eat vegetable yogurt that utilizes 40 to 60 weight percent of cold vegetables without the addition of preservatives and the like. Clearly, such a sizeable addition of cold pureed vegetable is not merely a matter of choice. For the amount of vegetable required by Applicant's claims 1-18 and the requirement that the vegetables be added in a cold pureed state constitute elements that function to yield a highly nutritional food product that is nutritionally stable and viable without the need for the addition of stabilizing agents.

Accordingly, reconsideration of the rejection of claims 1 – 7, 10 – 15 and 18 under 35 USC §103(a) as being unpatentable over Hara, Kazutada et al., Masahiro et al., and/or Oliver is respectfully requested.

CONCLUSION

In view of the amendments to the claims and the remarks set forth above, it is respectfully submitted that the present application is in allowable condition. Reconsideration of the rejection and allowance of claims 1 – 7, 10 – 15 and 18, as amended, are earnestly solicited.

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